No. 15,891

IN THE

United States Court of Appeals

For the Ninth Circuit

BERNARD KIRSCH,

Appellant,

vs.

GEORGE BARNES, MILTON L. HUBER, G. EDWARD GOODWIN, MILTON L. HUBER and G. EDWARD GOODWIN, a co-partnership, doing business as Huber & Goodwin,

Appellees.

OPENING BRIEF FOR APPELLANT.

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1. Statement of jurisdiction of the District Court and Court of Appeals and statutes involved.

The complaint alleges diversity of citizenship and the requisite amount in controversy pursuant to U.S.C.A. Title 28, Sec. 1332 (T. 3-4).

A motion to dismiss the complaint was granted (T. 28). A motion by plaintiff for leave to file an amended complaint was denied (T. 46). Plaintiff appealed pursuant to Rule 73, Federal Rules of Civil Procedure. This court has jurisdiction of said appeal under U.S.C.A. Title 28, Section 1291.

The following statutes of California are involved:

Civil Code Sections 761, 1195; Government Code Sections 8214, 27280, 27286, 27287, 27288; Code of Civil Procedure Sections 338, 340, 343, 392, 738; Public Resources Code Section 5006; Penal Code Section 115.

2. Statement of the case.

This appeal involves the sufficiency of an amended complaint, leave to file which was denied after the District Court granted a motion to dismiss the original complaint.

Plaintiff was the owner of timber located in Humboldt County. By this action he seeks damages resulting from the recordation by defendants of a contract to which they had procured the attachment of a false notarial certificate. This certificate attested that the plaintiff had acknowledged his signature to the contract.

The contract was made on October 16, 1952 between plaintiff and defendants Barnes and Huber & Goodwin. It provided for the cutting of plaintiff's timber and the sale of his logs under the supervision of Barnes, and the collection of the proceeds by Huber & Goodwin. After payment of expenses and other fixed charges the balance was to be distributed by Huber & Goodwin in stated percentages. There was no transfer of title to the timber by plaintiff to Barnes or to Huber & Goodwin. No transfer of title occurred until the logs were sold to the ultimate consumer. Barnes was not authorized in his own right or for his own account to cut or remove the timber. Whatever services he performed were for the purpose of converting plaintiff's timber into cash so that it could be available for distribution. The contract did not affect

title to property and was not eligible for recordation (T. 11-14).

The contract was prepared by Huber & Goodwin who were and had for years been regularly employed as plaintiff's attorneys (T. 32). Defendant Barnes had for many years acted in a confidential capacity for plaintiff and procured sales of real property belonging to plaintiff which was located in the same vicinity as the timber above mentioned. In said transactions Huber & Goodwin had participated in their capacity as plaintiff's attorneys and in one instance had shared with Barnes in the commission paid by plaintiff for Barnes' services (T. 33).

Plaintiff never acknowledged execution of the contract. The false certification with respect to plaintiff's signature was hatched in the office of Huber & Goodwin. They had in their employ an attorney named Murray who also held a notarial commission. The defendants procured Murray to attach to the contract his certificate of acknowledgment by plaintiff (T. 34-5). This fact was concealed from the plaintiff.

The attachment of the false certificate was a part of a pre-conceived plan of defendants to qualify the contract for recordation and to create on the record an apparent encumbrance against plaintiff's title to the timber. Defendants' purpose was to place an obstacle in the way of any transaction into which plaintiff might thereafter enter with respect to the timber (T. 34).

In 1953, while the contract was in the course of performance, the State of California decided to acquire a portion of the timber for park purposes. The defendants were aware of the State's interest. While negotiations

were in progress, defendant Barnes surreptitiously and without plaintiff's knowledge and consent recorded the contract. This was done as a part of the plan devised as above stated and for the purpose of causing the title insurance company to refuse to pass the title to the timber and to note the contract as an exception to plaintiff's title and thereby prevent the sale. If the false certificate had not been attached the County Recorder would have refused to record the contract (Amended Comp. Par. IX, T. 37-8).

The recordation was concealed from the plaintiff and did not come to light until the sale to the state was about to be consummated (T. 38). As the defendants anticipated, the state required a policy insuring title to the timber, free and clear of encumbrances. The title search disclosed the contract on record. Consequently, the sale was delayed for a protracted period to the substantial damage of plaintiff (T. 37-8). The contract would have been disregarded if the false certificate had not been attached (T. 38-9). But the presence on record of a contract bearing what appeared to be an authentic certificate of acknowledgment and constituting a seeming encumbrance created a risk which the title company was unwilling to assume (Amended Comp. Par. X, T. 38).

As the result of defendants' chicanery the sale could not be completed until the apparent encumbrance was removed. In order to accomplish this plaintiff was compelled to escrow a large portion of the purchase price to provide for the satisfaction of any claims which defendants might establish against him under the contract (T. 38-9). These claims were involved in a lawsuit which in

the interim had been commenced in the District Court at Sacramento involving the legal effect of the contract. The amount retained in escrow above mentioned was to cover any judgment to be obtained by defendants in that lawsuit and was not limited to the amount of damages which defendants claimed with respect to the portion of the timber sold to the State.[1]

As a result of the delay in the consummation of the sale to the State—proximately caused by the recordation of the contract with its false certificate of acknowledgment—plaintiff suffered damages in that (a) he was deprived of the income which would have been earned if the payment of the price had not been postponed and (b) he was compelled to pay taxes on the timber in the interim (T. 40-41). The activities of the defendants above set forth were not discovered by plaintiff until February 7, 1956 in the course of the trial of the lawsuit involving the controversy concerning the contract (T. 35-7).

3. Statement of question involved and the manner in which it is raised.

The question involved is whether the amended complaint states a claim against defendants upon which relief can be granted.

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[1]The aggregate amount placed in escrow was $125,000. Judgment was given in favor of Barnes against Kirsch in the sum of $45,492.20 and for Huber & Goodwin in the sum of $21,865.90, making a total of $67,358.10. Of this $26,000 was awarded with respect to the timber acquired by the state. The defendants have refused to release the excess of the amount on deposit over the amount of the judgment with costs and anticipated interest.

This question is raised by the ruling of the District Court denying plaintiff's motion for leave to file an amended complaint.

The amended complaint states a cause of action based on two independent grounds:

(1) The conduct of the defendants constituted a false representation that the contract had been properly acknowledged by the plaintiff and was eligible for recordation. As the result, plaintiff's title to the timber was disparaged.

Plaintiff had the right to sell the timber to the state. In fact, confronted with the state's power of eminent domain, he had no alternative. If as the result of the sale the defendants would be deprived of a profit to which the contract entitled them, their remedy was to sue for damages. But they had no right by unlawful and criminal means to procure the recordation of the contract and thereby not only compel plaintiff to escrow funds for the account of defendants but also delay the consummation of the sale.

(2) The recordation of the contract with its counterfeit certificate of acknowledgment constituted a false representation that the contract affected the title to plaintiff's timber. The contract did not transfer any title to the timber nor did it constitute a sale thereof. It did not confer on any of the defendants the right to cut the timber in their own behalf or for their own account. It merely authorized Barnes in the capacity of general manager of the operation to supervise the logging of the property so that the logs could be sold and the proceeds divided in the manner stipulated in the contract.

4. Specification of errors relied on.

The District Court erred in holding that plaintiff's amended complaint did not state a claim upon which relief could be given and in denying plaintiff's motion for leave to file the amended complaint submitted on said motion. The District Court erred in holding that no facts could be stated by plaintiff upon which to support a claim entitling plaintiff to relief and in granting the motion to dismiss the complaint.

ARGUMENT.

5. The basis of the decision of the District Court.

The learned District Judge filed two opinions: The first granting defendants' motion to dismiss, and the second, denying plaintiff's motion to file an amended complaint. There is no substantial difference between the reasoning involved in the two opinions. The basic theory is (1) that the contract affected title to real property and was, therefore, eligible for recordation; (2) that the defendants were entitled to apprise the state of the existence of the contract even though they adopted criminal means to accomplish that result; and (3) that even though the sale to the state was indefinitely postponed to Kirsch's damage, he has no right to recover.

With all deference to the learned District Judge, we submit that all three of the foregoing propositions are erroneous. We submit that plaintiff was entitled to sell his timber without interference on the part of defendants, that if—notwithstanding the state's power of eminent domain—the sale gave rise to a claim in favor of Barnes,

Huber and Goodwin for the profit which they would have earned, their sole remedy was to sue Kirsch for such lost profit, and that they had no right to procure a false certificate of acknowledgment and to record the contract for the purpose of preventing the sale until Kirsch met their demands for escrow of funds to satisfy their claims. The defendants have inflicted a wrong upon the plaintiff; for every wrong there is a remedy; consequently, the defendants are liable to Kirsch for the damages which he has suffered as the result of defendants' activities.

6. **By the use of criminal means the defendants obtained the false certificate of acknowledgment and thereby gave the contract the appearance of an instrument eligible for recordation. Their conduct in recording the contract constituted a false representation that the certificate was genuine. This plan was carried out for the purpose and with the effect of impeding the sale to the state. It inflicted injury on the plaintiff and defendants are liable in damages for his loss.**

The contract with the signatures of its four parties was a perfectly honest agreement. It assured to Barnes, Huber & Goodwin a share of the net proceeds of Kirsch's logs when and if they were sold to the mill, provided that the sales price exceeded the stipulated items which must first be paid. It created no challenge to Kirsch's title or his ability to sell a portion of the lumber to the state. If such a sale was in contravention of the rights of Barnes, Huber & Goodwin, they were entitled to relief as in any case of contract. But they had no right for their own ulterior advantage to prevent the sale and thereby subject Kirsch to additional loss. Kirsch was in a veritable dilemma. The state's desire to acquire part of the timber for park pur-

poses rendered it impossible to remove it from the premises. If acquisition could not be accomplished by negotiation, the state's power of eminent domain could be invoked. The portion of the timber which the state wished to procure could not be cut. As to such timber the Barnes contract could not be performed. Assuming that the contract was irrevocable, Kirsch could not perform. Therefore, he was entitled to proceed with the sale to the state with reasonable dispatch and to make such accounting as the contract and applicable law required with respect to the other parties.

The certificate of acknowledgment was a complete fabrication. When it was attached the contract became a false instrument. It assumed the false guise of a document affecting Kirsch's title, in appearance eligible for recordation. When the contract was recorded it became a seeming encumbrance the effect of which was to deprive Kirsch of his right to dispose of his property. Kirsch's rights were invaded. This was not merely wrongful conduct. Under Section 115 of the Penal Code of California it was a criminal act.[2]

The invasion of Kirsch's rights was no accident. It was a calculated maneuver deliberately adopted for the express purpose of preventing Kirsch from consummating the sale to the state of a portion of the timber (T. 37-38).

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[2]Penal Code, Section 115:

Procuring or offering false or forged instrument for record.

Offering false or forged instruments to be filed of record. Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this State, which instrument, if genuine, might be filed, or registered, or recorded under any law of this State or of the United States, is guilty of felony.

Suppose that Barnes had merely notified the state of the existence of the contract. This would not have disturbed the record title and the Title Insurance Company could have issued a policy containing no reference to the contract.

But even if by mere notice to the state Barnes could have stopped the sale, this did not entitle him to accomplish the same result by unlawful means and to be immune from liability.

The Title Insurance Company found the contract on record. Therefore, it had no alternative but to include it as an exception in any policy which it might issue.

Let us assume for the sake of argument that notwithstanding the decision of the state to acquire some of the timber,[3] the defendants were nevertheless entitled to a percentage of the net proceeds which would have been produced by removal of the timber in accordance with the contract. Would this have justified the defendants in stopping the sale? Certainly not. The defendants had an appropriate remedy. But they were not satisfied with the protection provided by law. They undertook to take the law in their own hands and to prevent a sale unless it was

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[3]The power of the State Park Commissioner to acquire property by purchase or condemnation is set forth in §5006 of the Public Resources Code of California which in part provides as follows:

> The State Park Commission, with the consent of the Department of Finance, may acquire by purchase or by condemnation proceedings brought in the name of the people of the State of California, title to or any interest in real and personal property which the commission deems necessary or proper for the extension, improvement, or development of the State Park System. (Here follow provisions with respect to proceedings for condemnation.)

effected on their terms. Until their demands were satisfied by the escrow arrangements the sale was delayed. Hence, Kirsch not only was required to respond to all of defendants' claims under the contract and to provide security for payment of the claims; in addition he was subjected to long postponement of receipt of the sales price and consequent loss.

It makes no difference whether the case falls into one category or another nor what—to use the words of the learned District Judge—is "the gravamen of the action" (T. 27). Wrongful conduct caused damage and created a right to relief. The essence of Kirsch's loss was that his right to dispose of his property was obstructed. This was caused by the recordation of a false document, the falsity of which consisted in the representation that Kirsch's signature was properly attested so as to entitle the contract to recordation.

Cases involving similar injury are considered in the light of wrongful disparagement of title. For example, in *Davis v. Wood,* 61 Cal. App. 2d 788, 143 P. 2d 740, the Superior Court sustained a demurrer to the complaint without leave to amend. The appellate court reversed, holding that a cause of action had been stated. The court said:

> From the foregoing statements of the law relating to damages for slander of title, or, to state it more accurately, for wrongful disparagement of title, it is apparent that the elements of damages are the loss caused by the impairment of vendibility and the cost of clearing the title. Therefore, in our opinion, a complaint which alleges that by reason of the recording of a notice of location by respondents the lease-

> hold interest of appellant was greatly depreciated in value and was rendered unmarketable, to appellant's damage in the sum of $10,000, states the ultimate fact of damages and is sufficient as against a general demurrer. (p. 798; p. 745)

In *Gudger v. Manton,* 21 Cal. 2d 537, 134 P. 2d 217, damages were recovered on the ground of disparagement of Gudger's title to real estate even though the defendants' conduct consisted merely of an imputation of a claim of interest in Gudger's property. The case involved the recordation of a writ of execution on a judgment against Gudger's wife. The judgment was not against Gudger because the liability arose out of a tort committed by Mrs. Gudger before she married Gudger. Manton's attorneys in California levied and recorded a writ of execution on the interest of Mrs. Gudger in a parcel of real estate which stood in Gudger's name. This was his separate property and Mrs. Gudger had no interest in it. On this factual basis Gudger sued Manton and his attorneys and was awarded $16,000 in damages. This judgment was affirmed on the following ground:

> The recording of the notice of the execution necessarily embraced the imputation that plaintiff's wife had the whole or a part interest in plaintiff's property, and that such interest was subject to the execution levy. Otherwise there would have been no reason for recording the writ and notice of execution. Such instruments on record had all the appearance of an assertion by defendants of a claim to an interest in the property, and as a matter of common knowledge would have an effect upon a prospective purchaser of the property and the merchantability of the title. He would naturally assume that plaintiff's title was

> not merchantable, as it was encumbered by a lien to an indefinite extent. Defendants as reasonable persons should have reasonably foreseen that such would be the effect of their action. The essence of the matter is that there has been an actionable disparagement of title if the plaintiff has been proximately damaged thereby. . . . If the matter is reasonably understood to cast doubt upon the existence or extent of another's interest in land, it is disparaging to the latter's title where it is so understood by the recipient. (Rest. Torts, §629.) As we have seen, the reasonable imputation of the recording was a claim of an interest adverse to plaintiff's title. Whether a cloud on the title in the technical sense existed was immaterial. (pp. 542-3; p. 221)

The tortious conduct of defendants in the case at bar is much plainer. They made use of a false document intentionally falsified so as to make it effective for the intended purpose. The recordation was a clear-cut announcement that Kirsch had placed an encumbrance on his timber and had acknowledged his execution of the document so as to qualify it for recordation. This was not mere imputation or innuendo. It was not merely a circumstance from which it was possible to draw an inference of disparagement. On the contrary, it was deliberate and blatant.

In *Greeninger v. New Amsterdam Casualty Co.,* 152 Cal. App. 2d 645, 313 P. 2d 607, the court reversed a judgment after the sustaining of a demurrer without leave to amend—a situation exactly the same as at bar. The suit was on a notary's bond. It was based on the act of the notary in affixing to a deed a false certificate that

the grantor—Greeninger—had acknowledged its execution. The result was that the grantees who had procured Greeninger to sign the deed by fraud were enabled to record it and to sell the property to bona fide purchasers for value. There was no allegation that the notary was aware of the fraud. Nevertheless, the appellate court held that Greeninger could "have a cause of action based solely upon falsity of an acknowledgment" (p. 646; p. 609).

The court also referred to the provisions of the California codes concerning recordation and held:

> It is common knowledge that, as a result of these provisions (Civ. Code §§ 1213, 1214), title insurance is normally issued only in favor of those grantees whose deeds are of record. Many purchasers will purchase land only if they can secure title insurance. It may be that appellant can, at trial, establish that the acknowledgment and recording of the deed to the Ruelles was an essential to their later sale to bona fide purchasers. (p. 647; p. 609)

The court also considered the contention of the notary and his surety that in order to recover on a false acknowledgment the complaining party must show that he relied upon it. The court conceded that this was the situation in prior cases but—the court explains—this was due to the fact that in those cases it was the grantee who was damaged and who was the plaintiff in the action. The court called this a "chance circumstance" and held that the right to recover was not limited to a grantee, as opposed to a grantor who is damaged by a false certificate. The court said:

> Logically, the requirement should be only that the false certificate is a proximate cause of plaintiff's loss. (p. 646; p. 609)

Finally, on the question of proximate cause the court said that it could not be held as a matter of law that "the false acknowledgment could not be a proximate cause of the injury resulting to appellant from the sale to innocent third parties. As indicated, this is a question of fact, and not of law. Appellant is entitled to an opportunity to present the facts supporting her claim that proximate cause exists." (p. 647; p. 609)

7. The fact that the contract was valid does not deprive plaintiff of his right to recover.

The opinion of the learned District Judge denying the motion to amend states:

> As noted in this Court's previous opinion, no cause of action can be based on the falsity of the notarial certificate alone unless the underlying instrument itself is invalid for some reason (153 F. Supp. at 263). (T. 43.)

We respectfully submit that the authorities cited above suffice to demonstrate otherwise. In *Gudger v. Manton*, 21 Cal. 2d 537, 134 P. 2d 217 (supra) the instrument which was placed on record was a writ of execution upon all the interest of Mrs. Gudger—the judgment debtor—in a parcel of real property. Mrs. Gudger had no interest in the property. It belonged to her husband. But the writ itself was not invalid. The vice of the activity on which the action was based was the use which was sought to be made of the writ. A valid instrument may be used in

such a way as to inflict injury. Likewise, in the case at bar the contract was used in an unlawful manner in order to accomplish an unlawful purpose and to cause Kirsch to suffer substantial loss.

The case here is the same as if Kirsch had borrowed money from Barnes and Goodwin and had given as security an order addressed to the sawmills authorizing the latter to pay the proceeds of the sale of any logs which Kirsch might deliver so that such proceeds could be applied on Kirsch's indebtedness. The order would be a valid instrument. But it would not give the defendants the right to procure the attachment of a false certificate of acknowledgment by Kirsch and the recordation of the order. It would not give the defendants the right to use the order in that manner so as to prevent Kirsch from selling his growing timber.

In support of his ruling that the invalidity of the underlying instrument is an essential factor of a cause of action, the first opinion of the District Judge (dismissing the complaint) cites *Heidt v. Minor,* 113 Cal. 385, 45 P. 700, and states:

> Where a loss is sustained by reason of a false certificate of acknowledgment of a forged instrument the measure of damages recoverable for such official misconduct by the notary is determined by the evaluation of the rights which would have accrued to the injured party had the underlying instrument been valid (Heidt v. Minor, 113 Cal. 385; facts set forth at 89 Cal. 115). The clear implication from this rule is that there could be no recovery against the notary or his surety for his official misconduct in executing a false acknowledgment where the underlying instru-

ment is valid, for no measurable damages would result therefrom. (T. 25-26.)

Heidt v. Minor was a suit against the surety on a notary's bond. The decision is applicable only to the notary's liability. There is no warrant for an extension of the ruling to the case at bar where the wrongful acts were committed by parties whose deliberate purpose was to prevent the owner from making a sale of his property. The opinions of the learned District Judge contain no reason for any such extension.

Furthermore, the decision in *Heidt* is based on the particular circumstances of the case. It would not even be controlling in all actions involving the misconduct on the part of the notary. An analysis of the decision will readily demonstrate this.

Mrs. Heidt had made a loan and had received a mortgage as security. The mortgage was a forgery. Attached to it was a false certificate of acknowledgment by the purported mortgagor. The loan was not paid and Mrs. Heidt sued the notary's surety and recovered judgment for the amount of her loss.

The surety appealed on the judgment roll. He relied on the absence of any finding that if the mortgage had been genuine, it would have been of any value. The contention prevailed and the judgment was reversed. The appeal is reported at 89 Cal. 115, 26 P. 627. The ground of the reversal was that the misconduct for which the surety was liable was limited to attachment of the false certificate and if the property subject to mortgage was worthless, no damage would be suffered by the lender

which was attributable to the notary's misconduct. The court held:

> And the plaintiff is not entitled to recover any more than her loss, by reason of said certificates being false instead of true. If the mortgages had been valid in every respect, their value as securities would have depended upon the value of the mortgaged property. (p. 121; p. 629.)

Then the court considers the result in the event that the value of the mortgaged property was less than the loan. The court said:

> Otherwise they might be of less value, or no value at all, as in the case of *McAllister v. Clement,* 75 Cal. 182, in which the finding was, that the property mortgaged was wholly valueless, and that plaintiff had not suffered any damage by reason of the defective certificate of acknowledgment. The judgment in that case, in favor of the defendants, was affirmed by this court, on the ground that no action will lie to recover damages if no damages have been sustained. (p. 121; p. 629.)

Thus, it is clear that the determinative factor of the *Heidt* case is the matter of damages.

The case was tried a second time. Mrs. Heidt again prevailed. The surety appealed. Judgment was affirmed (113 Cal. 385, 45 P. 700). The court explained the prior decision (89 Cal. 115, 26 P. 627) as follows:

> . . . and it was therefore held that upon those findings it could not have been ascertained whether or not plaintiff had suffered any loss *by reason of the false certificate.* (Italics quoted.) (p. 388; p. 701.)

The court held that this defect had been remedied by evidence at the second trial that the supposed mortgagor "was solvent, and able to pay the note set forth in the mortgage, and that had said mortgage been genuine, he would have paid that note", even though he "did not own, or claim to own, any part of the lands embraced in the mortgage." (pp. 388-9; p. 701.) The court held:

> The value of the mortgage, therefore, depends not merely on the value of the mortgaged property, but, in case of the insufficiency of that property, upon the solvency of the mortgagor. When it appears, as it does in this case, that the plaintiff, had the mortgage been genuine, would have been able to collect the whole amount named therein, he is entitled to recover that amount without regard to the value of the mortgagor's interest in the mortgaged property. (p. 390; p. 701.)

The theory of the *Heidt* case is that the test as to damages depends on the question whether the property described in the mortgage is of any value and whether the purported mortgagor is financially responsible. If the property is valueless and the mortgagor is judgment-proof, it makes no difference whether the certificate of acknowledgment is true or false. Even if it was genuine, Mrs. Heidt would be in no better position. The determinative factor is not the invalidity of the underlying instrument. The District Judge's interpretation of the *Heidt* case is, we respectfully submit, erroneous.

The difference between *Heidt v. Minor* and the case at bar must be clear. Here the damage was inflicted by a disparagement of title accomplished by means of a false certificate of acknowledgment and recordation. These

damages do not depend on the invalidity of the contract. In *Heidt* there was no disparagement of title; there was no recordation.

Greeninger v. New Amsterdam Cas. Co., 152 Cal. App. 2d 645; 313 Pac. 2d 607 (supra) was decided July 19, 1957 in the interval between the two opinions of the learned District Judge in the case at bar. *Greeninger* was cited in support of plaintiff's motion to amend. In his opinion denying the motion the District Judge made the following comment:

> The distinction between the instant case and the case of Greeninger v. New Amsterdam Casualty Co., 152 A.C.A. 686, which plaintiff asserts controls the case at bar, is that in Greeninger the underlying instrument to which the notarial certificate was affixed was procured by fraud, whereas, in the instant case, no assertion has ever been made that there is any doubt as to the validity of the underlying contract between plaintiff and defendants. (T. 43-44.)

But the learned District Judge has overlooked the fact that the notary was not a party to the fraud by which Greeninger was induced to sign the deed. When the deed was presented to the notary on the day following signature it had all the appearance of a valid instrument. The sole misconduct on the part of the notary was his false certificate. Yet the court held that this could be a proximate cause of Greeninger's loss and that would suffice to impose liability on the notary and his surety.

The foregoing discussion should suffice to show that invalidity of the instrument is not an essential part of the cause of action for disparagement of title; also

that even in an action against the notary the requirement that the instrument be invalid is only applicable in the event that the same damage would be suffered by the complainant regardless of the truth of the certificate of acknowledgment.

8. The false certificate and not the contract was the cause of the disparagement of plaintiff's title.

In his first opinion the learned District Judge rejected the contention of plaintiff that "it was the untrue acknowledgment, and not the valid contract, which cast doubt on the plaintiff's title to the property, and thus caused the delay in the sale" (T. 27). The District Judge ruled that "Truth does not disparage" (id.). The answer is that when the false certificate was attached and used as a means of producing recordation the defendants were no longer in the realm of truth. They published a falsehood.

The District Judge also stated:

> As such, the false certificate of acknowledgment, by itself, could impart no disparaging imputation or innuendo against plaintiff's interests in the timber. To conclude otherwise would be to indulge in a series of tenuous syllogisms unwarranted by the California law. (T. 27.)

The answer is that unless recorded with a certificate of plaintiff's acknowledgment attached, the contract would not have stopped the sale. This is not only self-evident. It is specifically alleged in the proposed amended complaint (T. 38-9). This allegation cannot be ignored. Hence, it was the false certificate that produced the disparagement of title.

The District Judge inferentially holds that the defendants had the right to publish the contract (T. 27-8). This is true provided that it was done for a legitimate purpose and not to impede the sale. Furthermore, the defendants would be restricted to the use of lawful—as opposed to dishonest—means. Even assuming that they could with impunity send the state agency a copy of the contract, they had no right to use recordation on the basis of a false certificate as the means of interference.

The District Judge holds that all that plaintiff "lost as a result of such recordation was his power to conceal the existence of the Barnes' contract, which, so far as the record shows, was valid and binding as between the parties to it." (T. 28.) The answer is the same as above set forth. The disclosure to the state of the existence of the contract would not have impeded the sale. The mere existence of the contract would not have provided a threat to the title which the state purposed to acquire. Hence, the plaintiff had no desire or reason to conceal the contract. But the recordation was something else. That gave the transaction the semblance of encumbrance. Confronted by this the state would not buy.

The answer to the theory of the decision of the District Judge is also found in *Greeninger v. New Amsterdam Cas. Co.,* 152 Cal. App. 2d 645, 313 P. 2d 607 (supra) where the court held:

> To sustain the general demurrer here, it would be necessary to hold, as a matter of law, that the false acknowledgment could not be a proximate cause of the injury resulting to appellant from the sale to innocent third parties. As indicated, this is a question of fact, and not of law. Appellant is entitled to an

opportunity to present the facts supporting her claim that proximate cause exists. (p. 647; p. 609.)

9. Without Kirsch's acknowledgment the contract could not have been recorded and even if recorded, it would have been of no effect as to a subsequent purchaser.

In a footnote in the first opinion of the District Judge he refers to the certificates of acknowledgment by Barnes and Huber & Goodwin (T. 24), but he does not consider this as a ground for decision. Out of an abundance of caution we deem it advisable to discuss the point.

If the contract had been tendered for record without the acknowledgment of Kirsch, it would not have been accepted. This is alleged in paragraph IX of the proposed amended complaint (T. 38). Furthermore, Chapter 6 of the California Government Code controls the activity of County Recorders. Article 3 is entitled "Documents to be Recorded". Section 27288 requires that the instrument be "executed and acknowledged or proved as provided in Section 27287 by the party who appears by the instrument to be the party whose real property is affected or alienated thereby."[4] Assuming that Kirsch's property was affected or alienated by the contract, his acknowledgment was essential.

Furthermore, even if by inadvertence the recorder were to overlook the absence of Kirsch's acknowledgment and to record the contract, this would be of no effect. In *Bell v. Sage,* 60 Cal. App. 149, 212 P. 404 (hearing in Supreme Court denied) one of two mortgagors failed to acknowledge her execution of the mortgage. The court held that recordation of the mortgage did not impart constructive

[4]Section 27288 is set forth in the appendix.

notice to subsequent purchasers.[5] *Bell v. Sage* was approved and followed in *Keese v. Beardsley,* 190 Cal. 465, 213 P. 500.

In the argument in the District Court the contention was advanced by defendants that Kirsch's signature could have been proved by a subscribing witness (citing Section 1195 of the Civil Code).[6] The District Judge did not discuss the point. The answer is first, that the signature was not so proved; instead a criminal means was employed; and second that no one signed a contract as a subscribing witness.

The defendants also cited Section 1207 of the Civil Code,[7] providing that if an instrument affecting title to real property is copied into the proper book of record, then after the lapse of a year it imparts notice to subsequent purchasers even though unacknowledged. The answer is first, that there is no allegation that the year had elapsed when the sale was stopped; second, that the

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[5]The opinion in *Bell v. Sage* is as follows:
Section 1161 of the Civil Code provides:
"Before an instrument can be recorded, . . . its execution must be acknowledged by the person executing it." Of course, the singular includes the plural, and where there are several grantors the acknowledgment of one of them is effective only as to his own grant and not as to those of the other grantors, in the absence of special statutory provision, and the record thereof is constructive notice only of the conveyance of the one who made the acknowledgment. (Webb on Record Titles, Sec. 58.) All of the decisions cited or discovered, with the execption of the early Massachusetts cases, support the rule as stated by the author. (Page 152; p. 406.) In other words, a defective execution or attestation as to one grantor, cannot be aided by a perfect execution and attestation as to other parties. To hold otherwise would be to defeat the manifest object of the registry laws, and to open a wide door to fraud. (Page 153; p. 406.)

[6]The Code section is quoted in the appendix.

[7]The Code section is quoted in the appendix.

recorder would not have accepted the contract for record in the absence of Kirsch's acknowledgment (Am. Comp. Par. IX, T. 38); and finally that Kirsch would have had an opportunity to have the recordation annulled if the circumstances of the false acknowledgment had been disclosed to him.

We conclude that the defendants' conduct in procuring the attachment of the false certificate constituted a false representation that the contract was eligible for record and that in procuring the recordation the defendants were guilty of wrongful disparagement of plaintiff's title.

We proceed to a discussion of the alternate and cumulative ground for relief which is set forth in the proposed amended complaint, viz. that the contract did not create any right in the defendants to the plaintiff's timber.

10. The contract did not affect title to or possession of real property and was not eligible for recordation. The applicable law of California.

At the root of the decision of the learned District Judge is the proposition that the contract "unquestionably affects the title to, or the possession of, real property within the meaning of §27280 of the California Government Code, and, thus, is entitled to recordation." (T. 45.) This requires an analysis and interpretation of the agreement. To assist in this process the applicable law of California as established by its appellate courts should first be ascertained.

Von Goerlitz v. Turner, 65 Cal. App. 2d 425, 150 P. 2d 278, involved a contract for the operation of a mine. It was agreed between the owners and the operators that

the latter should remove chrome ore from the mine "as long as ore can be found and price stays up" (p. 428; p. 279). The owners were to receive a percentage of the proceeds as royalty. The court held that it was apparent from the contract that "it did not create a right in the plaintiff's assignors to the exclusive use of the mine for a fixed term nor did it create an interest in the mine or the ore" (p. 429; p. 280). The court further held that the contract "merely provides for the operation of the mine on shares with provision as regards the compensation of the parties. . . . The agreement created no personal interest or right of exclusive possession, either in the mine or in the ore, in plaintiff or his assignors. Being merely a license to take ore from the mine, plaintiff's right thereto could arise only if and when it had been removed by him or his assignors." (pp. 429-30; p. 280.)

The foregoing decision is likewise applicable to the contract at bar which provides for the removal of timber, sale of the logs and division of the proceeds.

In *Crawford v. Pioneer Box Co.,* 105 Cal. App. 760, 288 P. 694, the original contract provided that Crawford should "fall, limb, buck and deliver to defendant's loading skids certain timber standing upon the lands described" (p. 762; p. 695). This was later modified to the effect that the defendant would pay Crawford, "over and above the price agreed upon in the original contract, the sum of $1.00 per thousand for all logs delivered under the contract after July 31, 1926" (p. 763; p. 695). The court held:

> Under the contract no interest in or title to the lands involved passed to plaintiff. All that distinguished plaintiff from a mere trespasser was the implied

license of defendant. The latter retained at all times control of the lands and the disposition of any timber thereon standing. (p. 767; p. 697.)

In *Hudepohl v. Liberty Hill Co.,* 80 Cal. 553, 22 Pac. 339, the decision is stated in the first paragraph of the syllabus as follows:

An agreement by a mining company, in the form of a lease for one year, giving to the lessee one half of the gross proceeds of the mine as a return for working the same in an energetic manner, and bearing all expenses, except necessary improvements, which are to be furnished by the lessor, does not create the relation of landlord and tenant, but is an agreement for working the mine on shares, and the parties become tenants in common of the products of the mine when taken out.

In *Rollins v. McDonald,* 7 Fed. 2d 422, the contract was in terms as well as legal effect substantially the same as the one at bar. Mrs. McDonald was the owner of standing timber "with the right to cut and remove the same before June 1, 1916" (p. 423). She made a contract with Fifield providing as follows:

1. The said Fifield agrees to cut, or cause to be cut all of the sawable lumber that can be cut and operated at a profit on said Rattlesnake Island on or before June 1, 1916, with such extension as can be secured; that the said Fifield shall either personally cut or cut by contract made by the said Fifield with some responsible party satisfactory to the said McDonald all of said trees on or before said date specified, all the bills of lading for the property thus cut being in the name of Fifield Lumber Company. The

> said Fifield shall be in entire charge of the cutting and all other lumbering operations (p. 423).

Then followed a provision for payment to Mrs. McDonald of stumpage and one-half of the profits.

In affirming the judgment of the trial court the Circuit Court of Appeals interpreted the agreement as follows:

> We also agree with his construction of the contract, that it was not a sale of the standing trees, but the employment of Fifield to cut and saw the same, and that the contract, read in the light of all the circumstances surrounding it and the usual conduct of lumbering operations, fairly disclosed that it was the intention of the parties that the title to the timber, when cut and sawed into lumber, should remain in the plaintiff with the right of possession until she should receive her stumpage of four dollars per thousand. (p. 425.)

There was a provision in the contract that Mrs. McDonald and Fifield "shall in no wise be considered partners" (p. 424). However, the Court of Appeals did not deem it necessary to mention this recital. In view of the terms of the agreement the recital was superfluous. Likewise, in the case at bar there is no basis for the conclusion that Kirsch entered into a partnership with the defendants.

In *Cloud v. Dean,* 102 So. 437 (Ala.), Cloud was the owner of timber. He made a contract virtually identical with that in the case at bar. Cloud agreed to permit Dean to cut and haul the timber to Mobile for sale. The contract provided that one-third of the proceeds from sale of the timber would be paid to Cloud and two-thirds to Dean, until Cloud had been paid $300, and thereafter all of the

proceeds would be paid to the cutter Dean. In holding that the contract did not give Dean any title to the timber, the court said:

> This was not a deed to the timber, but an agreement for the cutting and removal from the land to Mobile—an executory agreement to sell and convey the timber when severed and moved to the point indicated (p. 438).
>
> . . . . . .
>
> It is generally held that to pass title to real property apposite words of conveyance indicating such intention of the parties are necessary. (citations) (p. 439).

11. The agreement does not transfer title nor affect title to the timber. There is no change in the title until the logs are sold to the sawmill.

The first recital is that Kirsch was the owner of the timber, "generally known as the Prairie Creek timber, and desires to log the same" (T. 11). This is followed by a recital that "Barnes is experienced in forestry and logging and is capable of causing said timber to be logged" (T. 11). Then the agreement states that "Huber & Goodwin are able to prepare all agreements required, collect and disburse the forthcoming proceeds, and so forth" (sic) (T. 12).

In the first covenant of the contract (paragraph (1)[8]) Kirsch merely grants "permission" to log his timber.

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[8]"Kirsch agrees to permit the Prairie Creek timber aforesaid to be logged, commencing immediately and as rapidly as good forestry practices and market conditions permit. Barnes shall be and he is hereby designated the General Manager for the purpose of causing said timber to be logged economically, including the logging, relogging and making of split products thereon as economies permit." Here follows Barnes' agreement to enter immediately upon his duties, to take full charge of the operations, and

Barnes is designated as "general manager" of the operation. The clause demonstrates that Kirsch's status as owner is not modified or impaired. Barnes' position as general manager is typical of an employee—certainly not of an owner. His function involves one step in the process of converting the timber into cash.

Paragraph (2) of the agreement provides for delivery of logs to such consumer "as Barnes may from time to time select, at the maximum price which Barnes is able to obtain therefor". Barnes has no authority to collect the purchase price. On the contrary, this paragraph (2) provides that "payment for all logs shall be made directly from the purchasers thereof to Huber & Goodwin" (T. 12-13).

Obviously, this provision does not give Barnes or the firm of Huber & Goodwin any interest in the timber prior to its removal from the premises.

Paragraph (3) (T. 13-14) sets forth the manner in which the proceeds are to be disbursed by Huber & Goodwin.[9]

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devote such time as is reasonably necessary. Barnes is also given discretion in the employment of loggers, truckers and other facilities (T. 12).

[9]The substance of the provision for disbursement of the proceeds is as follows:

(a) Huber & Goodwin are to pay expenses in accordance with invoices approved by Barnes.

(b) To pay Kirsch a fixed charge "for all logs sold". This is generally known in the industry as stumpage. The rate is $8.50 per thousand board feet.

(c) To repay to Kirsch any advance made on and subsequent to October 15, 1952 (one day prior to the date which the contract bears) for "tractor work, road work, or any other expenses assumed and paid by Kirsch in preparing the property for logging",

The same paragraph provides for retention by Huber & Goodwin of a fund to pay "unanticipated expenses". It also provides for reports—at least monthly—accounting to Kirsch and Barnes for receipts and disbursements (T. 14).

These provisions contain express negation of the idea that any title to the timber or right to possession of the real property passed to Barnes or to Huber & Goodwin. Kirsch was entitled to stumpage on all timber to be cut. This was not to be paid by Barnes or by Huber & Goodwin. It was to come out of the price to be paid by the purchaser. The same arrangement is made with respect to logs which had been bucked prior to the contract and which were still located on the property.

Paragraph (4) undertakes to set up certain tax consequences. Normally, Kirsch's share of the proceeds of the timber would—to the extent that they exceeded his cost base—constitute capital gain, taxable at a fixed rate. On the other hand, the amount to be received by Barnes and Huber & Goodwin would constitute ordinary income and be taxable at higher graduated rates. Goodwin's plan, as set forth in paragraph (4), was to modify this consequence by fixing $15.00 per thousand feet as the fair market value of the timber. The result would be that

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thus demonstrating that it was contemplated that Kirsch would finance the operation with respect to the items mentioned.

(d) To pay Kirsch $6.00 per thousand feet for all logs which he had theretofore felled, bucked and peeled and which were located on the premises and ready for transportation to the market.

(e) Finally, to divide the surplus on the basis of stated percentages.

the excess over expenses and stumpage up to $15.00 would be deemed a capital gain and taxable at lower rates. This would be a decided advantage to Barnes, Huber and Goodwin. On the other hand, if the gross proceeds were more than $15.00 per thousand, this excess would in the case of all four participants be taxable as ordinary income. This would be a disadvantage for Kirsch because all of his share of the net proceeds would otherwise have been taxable as capital gain to the extent that the amount so received exceeded his cost base.

We need not determine whether the Internal Revenue Service would tolerate this legerdemain. The fact is clear that there is nothing in this provision which indicates any transfer by Kirsch to the other parties of title to the timber. On the contrary, the effect of the clause is to recognize that Kirsch's title is to persist until sale to the consumer. An artificial arrangement is set up to give Barnes, Huber and Goodwin a favorable tax position.

The foregoing analysis demonstrates that there is no basis for the District Court's conclusion that the contract constituted a transfer of title or that it affected title to the timber so as to make it eligible for recordation. No transfer of title would occur until sale and delivery of the logs to the consumer. Thereupon Barnes and the firm of Huber & Goodwin would become entitled to a share of the net proceeds after making the deductions in accordance with the terms of the agreement.

It is interesting to note that in the course of the argument of Kirsch's motion to amend, counsel appearing for Barnes expressly conceded that the contract did not affect title. In their brief in opposition to the motion they state:

> All that happened was that Barnes took a document down to the County Recorder's office which did not affect title . . .
>
> The fact that the contract did not affect title to the real property or possession of real property did not render it non-recordable.
>
> (p. 3-4)

Of course, the concession of opposing counsel is not controlling. But it is certainly worthy of consideration.

12. Analysis of the reasoning and cases cited in the opinion of the District Judge in support of the decision that the contract affected "the title to the land and the timber standing thereon" (T. 45-6).

The opinion denying plaintiff's motion to file an amended complaint states that "defendant Barnes was given the right to log, cut and market all of the Prairie Creek timber which was owned by plaintiff. Barnes was given, in short, complete control over the logging operations" (T. 44).

There is no doubt that Barnes was given control over the logging operations. But this did not divest Kirsch of any title to his timber or to the logs. As to the court's statement that "Barnes was given the *right* to log, cut and market" the timber, there is no such provision in the agreement. The supervision of the logging was not a right; it was a function which Barnes was to pursue—a job. The authority conferred on Barnes does not constitute a transfer of title.

The opinion then states that "the right to cut, remove and market timber was transferred, which is in the nature of a contract for the sale of goods" (T. 45). The answer

is first, that there was no transfer of title; and second, that the permission to remove Kirsch's timber does not constitute a transfer of anything but merely creates a license. The contract merely made it possible for Barnes, Huber and Goodwin to participate in the proceeds of sale in return for the services which they were to perform.

It is elementary that in a contract for the sale of goods there must be a seller and a buyer. Kirsch did not sell his standing timber to Barnes or to Huber & Goodwin. They did not buy the logs. The only sale contemplated was to the sawmill. That sale was not accomplished by the agreement. It would not occur until the logs were removed and delivered to the mill. Then for the first time there was "a sale of goods". We respectfully submit that the learned District Judge was in error in holding that the agreement at bar was for the sale of goods by Kirsch to the defendants.

In support of his ruling the opinion cites *Ascherman v. McKee,* 143 Cal. App. 2d 277, 299 P.2d 367[10] (T. 45). The transaction involved in *Ascherman* was quite different from that at bar. In the *Ascherman* case the District Court of Appeal describes the contract as one "for the purchase and sale of the right to cut and remove, on or

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[10]It should be noted that all citations in the opinion on this subject are without any discussion of the point actually decided. It is also noteworthy that none of the cases mentioned by the District Judge on this subject were cited by defendants in their briefs. The defendants were content to let the District Judge assume the burden of research. As stated above, counsel for Barnes conceded that the contract did not affect title. The result was that these cases appeared for the first time in the opinion denying leave to file the amended complaint. Consequently, plaintiff's counsel had no opportunity to discuss them or to seek to convince the District Judge that they are not in point.

before July 31, 1956, all fir and pine timber 20 inches and larger in diameter standing on certain described real property owned by plaintiff'' (p. 279; p. 368). The contract price was $20,000, of which $5,000 was immediately payable and the balance in subsequent installments. Thus it is clear that Mrs. Ascherman was the seller and the McKees were the buyers. It was a clear-cut transfer of title to the timber. We submit that there is no similarity between the Ascherman contract and the one at bar.

Then the opinion of the District Judge states:

> The right to remove timber under such a contract is characterized as a chattel real within the meaning of §765 of the California Civil Code, that is, an interest akin to a term for years (T. 45).

In support of this statement the opinion cites *Palmer v. Wahler,* 133 Cal. App. 2d 705, 285 P.2d 8. The implication is that the *Palmer* case decides that a party in the position of Barnes is under the contract at bar the holder of an estate for years. The fact is that in *Palmer v. Wahler* it was the Wahlers—the parties in the same position of Kirsch—who were held to be the owners of a chattel real. This can be readily demonstrated by an analysis of *Palmer v. Wahler.* It will be also clear that the instrument under which the Wahlers held title to the timber was altogether different from the contract at bar.

First it should be noted that Palmer, an unlicensed broker was suing for a commission which had been orally promised him for finding a buyer of the timber. The Wahlers defended on the ground that Palmer had no license and the oral agreement was invalid under the statute of frauds. The court held that ''a so-called 'finder's

agreement' falls neither within the purview of the statute of frauds nor the real estate licensing acts'' (p. 710; p. 12). As an additional reason for the affirmance of the judgment the court held that the transaction between the Wahlers and the buyer procured by Palmer constituted a sale of goods or personal property, and therefore, the employment of the broker did not come within the statute of frauds (p. 711; p. 12). It was in this connection that the District Court of Appeal held:

> Here neither the appellants (the Wahlers) nor their co-owners in the timber had any interest in the land upon which it stood. The time within which they could enter and remove the timber was limited by the terms of the grant to December 31, 1954. Therefore the ''estate'' which was the subject matter of the contract of sale was but one for years and was subject to disfeasance at the expiration of a fixed term (p. 711; pp. 12-13).

The Wahlers' status was the same as that of Kirsch. He owned the timber subject to the obligation to remove it within the stipulated time. The State owned the land. Kirsch's estate was ''one for years''. On the other hand, there is no similarity between the status of Barnes and Huber & Goodwin and that of the Wahlers. The contract did not constitute the defendants as owners of an estate for years. *Palmer v. Wahler* does not support the decision of the District Judge in the case at bar.

In the same connection the opinion of the District Judge cites *Dabney v. Edwards,* 5 Cal. 2d 1, 6-11, 53 P.2d 962, This was a suit by a broker for commissions for selling oil leases belonging to Edwards. Again the question was whether the transaction came within the statute

of frauds. The Supreme Court held that an oil lease for a fixed term is an estate for years. Obviously the defendants at bar were not lessees and the *Dabney* case is not pertinent here.

Having adopted the erroneous premise that Barnes alone—or together with Huber & Goodwin—was the owner of a chattel real, the opinion of the learned District Judge concludes that a chattel real is "considered an estate or interest in the particular property it affects within §761 of the California Civil Code" and is therefore "real property within the meaning of section 27280 of the California Government Code, and, thus, is entitled to recordation" (T. 45). The error of the premise demonstrates the fallacy of the conclusion.

In this connection the opinion (T. 45) cites *German American Savings Bank v. Gollmer,* 155 Cal. 683, 102 P. 932. This case involved a lease of real property which was held to be an estate for years within the definition of Civil Code section 761. On this ground the court decided that the lessee could avail himself of section 738 of the Code of Civil Procedure which provides for an action "by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim".

Obviously, the contract at bar has none of the characteristics of a lease. Barnes was not a lessee. He could not successfully maintain an action to quiet title. Therefore the *Gollmer* case is not in point.

The final citation in the opinion on this point is *Mallett v. Doherty,* 180 Cal. 225, 180 P. 531, in which—according

to the learned District Judge—the California Supreme Court "specifically held that the recordation of a contract involving the right to remove timber within a specified period of time is not only proper but will serve to constitute constructive notice to subsequent purchasers" (T. 45). The answer is that *Mallett v. Doherty* did not involve merely a "right to remove timber". On the contrary, there was a conveyance of the timber for a fixed price. The document read as follows:

> That for and in consideration of the sum of Three Thousand Dollars, the said party of the first part does hereby grant, bargain, sell and convey to the party of the second part, all timber suitable for sawmill purposes, and standing and being upon the following described Real Estate, . . . together with the free use and occupation of said premises and appurtenances, without charge, for the purpose of cutting, hauling, and sawing said timber (p. 227; p. 531).

Thus, it is clear that Mallett became the sole and exclusive owner of the timber together with the right of occupation of the premises. Consequently, he was entitled to record the document so as to give constructive notice to the world and protect his title against any subsequent purchaser for value. The defendants occupied no such status and had no such right.

13. The fact that the contract—even though recorded—imposed no encumbrance on the timber does not deprive plaintiff of his right to recover.

It has been contended by the defendants that if the contract did not affect title, then its recordation did not impose an encumbrance on Kirsch's timber or prevent the sale. The same theory was advanced in *Gudger v. Manton,*

21 Cal. 2d 537, 134 P.2d 217 (supra). The defendant there argued that "the levy of and recording of a writ of execution upon the real property of another, not a party to the judgment, does not constitute a lien nor cloud upon the title, and where the judgment debtor has no interest in the property, no right of the owner thereof is affected, and therefore it cannot be the basis for a disparagement of title action" (p. 541; p. 220). The answer—equally appropriate in the case at bar—was given by the Supreme Court as follows:

> Whether a cloud on the title in the technical sense existed was immaterial. While it is true the execution claimed only such interest as plaintiff's wife had in the property, the only reasonable implication is that in fact the wife did have an interest in the property and a lien thereon was claimed (p. 543; p. 221).

14. The action is not barred by the statute of limitations.

The first opinion dismissing the complaint contains the following footnote:

> The statute of limitations as a defense is not pressed by the defendants, and in view of the conclusions reached herein, the Court has not deemed it necessary to reach this issue at this time (T. 21).

Nevertheless, we deem it advisable to demonstrate that the action is not barred.

The applicable statute is Section 338 of the California Code of Civil Procedure.[11]

Section 338 fixes three years as the period for an action for injury to real property. In *Coley v. Hecker,* 206 Cal.

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[11]The pertinent portions of Section 338 of the Code of Civil Procedure are set forth in the appendix.

22, 272 Pac. 1045, an action for slander of title was held to be one for injury to real property for the purpose of determining proper venue. Section 392 in the Code of Civil Procedure[11] provides for the trial for such an action in the county in which the subject of the action is situated. The decision of the Supreme Court is stated in the syllabus as follows:

> (4) Place of Trial—Slander of Title—Injury to Real Property—Section 392, Code of Civil Procedure. —In such a case, slander of title is an injury to real property, and the contention that the term "injury to real property", as used in section 392 of the Code of Civil Procedure, was intended to include only physical interference with or physical injury to real property, cannot be sustained.

The foregoing reasoning is likewise applicable to the statute of limitations.

Coley v. Hecker was followed in *Smith v. Stuthman,* 79 Cal. App. 2d 708, 181 Pac. 2d 123, holding that an action for slander of title is one "for redress of an invasion of a particular property right" (p. 709; p. 124). Accordingly, the court held that the action—unlike one for a personal tort—survived the death of the wrongdoer. Another decision indicating that this is not an action for "libel or slander . . . of a person" within the one year statute (CCP Section 340[12]) is *Albertson v. Raboff,* 46 Cal. 2d 375, 295 Pac. 2d 405, holding:

> . . . the gravamen of an action for disparagement of title is different from that of an action for personal defamation . . . (p. 378; p. 408).

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[12]The pertinent portion of this section is set forth in the appendix.

The damages suffered by Kirsch were not fully accrued until June 29, 1956 (Am. Comp. Par. X, T. 38). The sale to the State was delayed from July 27, 1954 to June 29, 1956 (id. Par. XII, T. 40). Whichever of these two dates is determinative the three year period had not expired on November 30, 1956 when the complaint was filed (T. 17).

Slander of title, based on the recordation of a false document, is a continuing tort. In *Coley v. Hecker,* 206 Cal. 22, 272 Pac. 1045, the Supreme Court held:

> . . . in the instant case the libel was recorded in the office of the county recorder where the land was situate and constituted a continuing, permanent notice to the world that a judgment lien to the extent of $12,000 rested upon respondent's real property (p. 29; p. 1048).

In *Kafka v. Bosio,* 191 Cal. 746, 218 Pac. 753, the Supreme Court quoted from Cyc. as follows:

> "Where continuing or recurring injury results from a wrongful act or from a condition wrongfully created and maintained, such as a continuing nuisance or trespass, there is not only a cause of action for the original wrong arising when the wrong is committed, but separate and successive causes of actions, for the consequential damages arise as and when such damages are from time to time sustained; and therefore so long as the cause of the injury exists and the damages continue to occur, plaintiff is not barred of a recovery for such damages as have accrued within the statutory period beyond the action, although a cause of action based solely on the original wrong may be barred" (p. 751; pp. 755-756).

Now we will assume for the sake of argument that plaintiff's cause of action is deemed to have accrued on

the date when the contract was recorded. Even on this assumption the statute of limitations would be tolled by reason of defendants' concealment and the confidential relations between the parties. Therefore, Kirsch was entitled to sue within a reasonable time after he discovered the fraudulent certificate of acknowledgment. This was in February, 1956 while another suit between the same parties was on trial (Am. Comp. Par. VIII, T. 35-37). Hence, the suit was in time.

The conduct of defendants in procuring the false certificate of acknowledgement and recording the contract was not only surreptitious; it constituted a fraudulent concealment. Under settled California law, this tolls the statute of limitations until discovery by the plaintiff. The principle was originally adopted in *Kane v. Cook,* 8 Cal. 449. It has been consistently followed. For example, in *Kimball v. Pacific Gas & Electric Co.,* 220 Cal. 203, 30 Pac. 2d 39, the court held:

> We are of the opinion, however, that independent of statute, the fraudulent concealment by the defendant of the facts upon which a legal common-law action was based, under the proper circumstances, tolls the statute until discovery and that upon discovery the statute applicable to that particular action (in this case Code Civ. Proc., sec. 340, subd. 3) then commences to run (p. 210; p. 42).

The confidential status of Huber & Goodwin as Kirsch's attorneys and Barnes as Kirsch's broker is set forth in the Amended Complaint (Par. IV, T. 32; Par. V, T. 33; Par. VI, T. 33; Par. VIII, T. 35). The concealment is alleged in Par. VII, T. 34-35.

When Kirsch learned that the contract had been recorded, he was not obligated to make an investigation in the recorder's office, nor to know that the recorder would require a certificate of acknowledgment of Kirsch's signature, nor to conclude that such a certificate had been attached to the contract. Kirsch had signed other papers prepared by Huber & Goodwin (Am. Comp.; Par. VIII, T. 35). He was not obliged to note nor to charge his memory with the particular circumstances with respect to the signature of the contract in suit so as to suspect foul play when the delay of the sale came to his attention. He was not obliged to make an investigation of the conduct of his attorneys and broker—the co-parties to the contract—for the purpose of discovery of the falsity of the certificate. He had the right to assume that they had acted lawfully and properly.

In *Bennett v. Hibernia Bank,* 47 Cal. 2d 540, 305 Pac. 2d 20, the Supreme Court explains the effect of a confidential relationship with respect to the duty of inquiry. The court held:

> In view of the allegations indicating that a fiduciary relationship existed, the fact that a document disclosing these events was a matter of public record filed with the Secretary of State cannot alone cause the statute to run (p. 562; p. 34).
>
> . . . . . .
>
> The documents filed in that year, while public records and constructive notice for certain purposes, are not sufficient to start the running of the statute in favor of the fiduciary as to those of its members who had no knowledge of them (p. 562; p. 34).
>
> . . . . . .

> Plaintiffs must allege and prove facts showing the time and surrounding circumstances of the discovery of the cause of action upon which they rely. *(Hobart v. Hobart Estate Co.,* 26 Cal. 2d 412, 441-443 (159 P. 2d 958).) The purpose of this requirement is to afford the court a means of determining whether or not the discovery of the asserted invasion was made within the time alleged, that is, whether plaintiffs actually learned something they did not know before. In applying this rule it is important to recognize the distinction between cases where a plaintiff is under a duty to inquire and those in which he has no such duty until he has notice of facts sufficient to arouse the suspicions of a reasonable man. Where there is no such duty, for example, because of the existence of a fiduciary relationship, a plaintiff need not disprove that an earlier discovery could have been made upon a diligent inquiry but need show only that he made an actual discovery of hitherto unknown information within the statutory period before filing the action. *(Hobart v. Hobart Estate Co.,* 26 Cal. 2d 412, 442 (159 P. 2d 958).) The circumstances of the discovery which, according to the complaint, was made within two years prior to the filing of the action are sufficiently alleged to meet the requirements of the rule set forth above (pp. 563-4; p. 35).

In *Schaefer v. Berinstein,* 140 Cal. App. 2d 278, 295 Pac. 2d 113, the court held:

> In cases involving confidential relationships, the rule requiring allegations stating the circumstances which are relied upon by the plaintiff as excusing prior discovery of the fraud is relaxed. *(Bainbridge v. Stoner,* 16 Cal. 2d 423, 430 (106 P. 2d 423).) In *Hobart v. Hobart Estate Co.,* 26 Cal. 2d 412 (159 P. 2d 958),

> the court points out that it is recognized that in cases involving a fiduciary relationship "facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required" (p. 296; p. 125).

The effect of the confidential relationship upon transactions between an attorney and client is axiomatic. The subject is discussed at length in *Estate of Witt,* 198 Cal. 407, 245 Pac. 197 and *Cox v. Delmas,* 99 Cal. 104, 33 Pac. 836.

Even if the recordation of the contract had brought to Kirsch's mind the subject of acknowledgment and he had made an effort to reach a solution, there was every good reason why he should have concluded that a notary was available at the time that the contract was signed and that the certificate was in order.

In *California Sav. Etc. Soc. v. Culver,* 127 Cal. 107, 59 Pac. 292, the Supreme Court held that if the facts present a doubtful case as to the statute of limitations, the court will not indulge in a strained construction in order to support the defense.

In *Rutherford v. Rideout Bank,* 11 Cal. 2d 479, 80 Pac. 2d 978, the opinion states:

> The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been defrauded against those who have defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will

be charged with discovery in advance of actual knowledge on his part (pp. 485-6; p. 982).

We conclude that the action is not barred by the statute of limitations.

Dated, San Francisco, California,
May 12, 1958.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

Civil Code Section 761:

Enumeration of estates. Estates in real property, in respect to the duration of their enjoyment, are either:

1. Estates of inheritance or perpetual estates;
2. Estates for life;
3. Estates for years; or,
4. Estates at will.

Civil Code Section 1195:

§ 1195. Proof of execution, how made. Proof of the execution of an instrument, when not acknowledged, may be made either:

1. By the party executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses, in cases mentioned in section eleven hundred and ninety-eight.

Civil Code Section 1207:

§ 1207. (Notice by defectively executed or acknowledged instrument: Certified copies as evidence.) Any instrument affecting the title to real property, one year after the same has been copied into the proper book of record, kept in the office of any county recorder, imparts notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate; but nothing herein affects the rights of purchasers or encumbrancers previous to the taking effect of this act. Duly certified copies of the record of any such instru-

ment may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded; provided, when such copying in the proper book of record occurred within five years prior to the trial of the action, it is first shown that the original instrument was genuine. (Added by Code Amdts. 1873-74, p. 228; Am. Stats. 1897, p. 64; Stats. 1901, p. 398 (Unconstitutional); Stats. 1903, p. 108; Stats. 1909, p. 45; Stats. 1913, p. 75; Stats. 1915, p. 1211; Stats. 1919, p. 244; Stats. 1921, p. 94; Stats. 1927, p. 828.)

Code of Civil Procedure Section 338:

§ 338. Within three years:

. . .

2. An action for trespass upon or injury to real property.

Code of Civil Procedure Section 340:

Within one year:

. . . . . .

3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, . . .

Code of Civil Procedure Section 343:

§ 343. . . . An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

Code of Civil Procedure Section 392:

§ 392. . . . (1) Subject to the power of the court to transfer actions and proceedings as provided in

this title, the county in which the real property, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions:

(a) For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property; . . .

Code of Civil Procedure Section 738:

Action to quiet title to real and personal property. An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim . . .

Government Code Section 27280:

Instruments or judgments affecting title. Any instrument or judgment affecting the title to or possession of real property may be recorded pursuant to this chapter.

Government Code Section 27287:

Acknowledgment of execution: Proof by subscribing witness, etc.: Certification. Unless it belongs to the class provided for in either Sections 27282 to 27286, inclusive, or Sections 1202 or 1203, of the Civil Code, or is a fictitious mortgage or deed of trust as provided in Section 2952 of the Civil Code, before an instrument can be recorded its execution shall be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary or other person executing it on behalf of the corporation,

or proved by a subscribing witness or as provided in Sections 1198 and 1199 of the Civil Code, and the acknowledgment or proof certified as prescribed by law.

Government Code Section 27288:

Section 27288: If the instrument is an agreement for sale, lease, option agreement, deposit receipt, commission receipt, or affidavit which quotes or refers to an agreement for sale, lease, option agreement, deposit receipt, commission receipt, or lease and such instrument claims to, or affects any interest in real property, it shall be executed and acknowledged or proved as provided in Section 27287 by the party who appears by the instrument to be the party whose real property is affected or alienated thereby.